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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69843; File No. SR-FINRA-2013-026)

June 25, 2013

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Members' Filing Obligations under FINRA Rule 5123 (Private Placements of Securities)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 20, 2013, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing rule changes related to members' filing obligations under Rule 5123 (Private Placements of Securities).

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 7, 2012, the Commission approved FINRA Rule 5123 ("Private Placements of Securities" or the "Rule"),<sup>4</sup> which requires that members file with FINRA any private placement memorandum, term sheet or such other offering document as exists in connection with a specified private placement in which the member participates. Specifically, the Rule provides that each member that sells a security in a non-public offering in reliance on an available exemption from registration under the Securities Act of 1933 (i.e., a private placement) must: (1) submit to FINRA, or have submitted on its behalf by a designated member, a copy of any private placement memorandum, term sheet or other offering document, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the date of first sale; or (2) indicate to FINRA that no such offering documents were used.

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<sup>4</sup> See Securities Exchange Act Release No. 67157 (June 7, 2012), 77 FR 35457 (June 13, 2012) (Notice of Filing of Amendments No. 2 and No. 3 and Order Granting Accelerated Approval of File No. SR-FINRA-2011-057).

To facilitate the transmission of the required information from members to FINRA, FINRA has developed an electronic form for the processing of specified private placement filings (“Private Placement Form” or “Form”), which must be filed through FINRA Firm Gateway.<sup>5</sup> As announced in Regulatory Notice 12-40, the Form, an abbreviated version of which has been in use since the Rule became effective on December 3, 2012, provides an efficient way for firms to submit the filings electronically in searchable Portable Document Format (PDF) to FINRA.<sup>6</sup>

FINRA is filing the proposed rule change to codify the requirement that members file the Private Placement Form via FINRA Firm Gateway in connection with their compliance with Rule 5123, as set forth in Regulatory Notice 12-40. The existing Private Placement Form requests identifying and contact information for the member and the issuer, whether there is an affiliate relationship between the member and the issuer or sponsor, and basic information about the nature of the offering (e.g., the type of offering, the expected commencement date and whether a Form D has been filed with the SEC). FINRA also is proposing that the Form request, to the extent known by the member, certain other due diligence-related information concerning the offering, the issuer and its management,<sup>7</sup> but would permit members to respond “unknown” to such questions. Therefore, this Form does not impose any obligation on broker-dealers to seek out

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<sup>5</sup> FINRA Firm Gateway is an online compliance tool that provides consolidated access to FINRA applications and allows firms to submit required filings electronically to meet their compliance and regulatory obligations.

<sup>6</sup> See Regulatory Notice 12-40 (September 2012).

<sup>7</sup> FINRA provided guidance on the scope of a firm’s responsibilities to conduct a reasonable investigation of private placement issuers in Regulatory Notice 10-22 (April 2010).

information that they do not already have. Specifically, the Form would include questions, to the extent known, regarding:

- whether the offering is a contingency offering;
- whether independently audited financial statements are available for the issuer's most recently completed fiscal year;
- whether the issuer is able to use offering proceeds to make or repay loans to, or purchase assets from, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer's affiliates;
- whether the issuer has a board of directors comprised of a majority of independent directors or a general partner that is unaffiliated with the firm;
- whether the issuer has engaged, or does the member anticipate that the issuer will engage, in a general solicitation in connection with the offering or sale of the securities; and
- whether the issuer, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer's affiliates has been the subject of SEC, FINRA or state disciplinary actions or proceedings or criminal complaints within the last 10 years.

FINRA also proposes to ask members to select an industry category for the specified private placement offering when completing the Form.

The revised Form will assist FINRA in fulfilling its regulatory responsibilities by providing critical information regarding the nature of the offering, involved parties and the member's role in offering the securities.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change immediately.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, in that it will assist in FINRA's efforts to detect and prevent fraud in connection with specified private placements. In addition, the proposed rule change will assist FINRA in evaluating the specified private placement activities of member firms and assess whether members are conducting a reasonable investigation for specified private placement offerings in which they participate.

### B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA notes that all members that participate in specified private placements will have to file electronically (or have another member that is participating in the specified private placement file on its behalf) a Private Placement Form in connection with Rule 5123. In addition, outside of very basic information about the member, the issuer (i.e., identity of the issuer and its contact information) and the nature of the offering (e.g., whether a Form D has been filed with the SEC), the Form will permit members to respond "unknown" to virtually all due diligence-related questions.

Because the new questions to be added to the Form in connection with this proposed rule change do not impose an affirmative duty on members to obtain answers,

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<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

but only requires the member to provide the information on the Form if known, FINRA believes that the proposed rule change presents a very modest filing burden upon members. In light of the role of Rule 5123 and the Form in assisting FINRA in its efforts to detect and prevent fraudulent and manipulative acts and practices and enhance the protection of investors, FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

FINRA has filed the proposed rule change pursuant to Section 19(b)(3)(A)<sup>9</sup> of the Act and Rule 19b-4(f)(6) thereunder.<sup>10</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires FINRA to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>11</sup> normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii)<sup>12</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will assist in FINRA's efforts to detect and prevent fraud in connection with specified private placements. As noted by FINRA, the burden on members will be minimal because electronic filing of an abbreviated version of the Form accompanying specified private placement filings has been operative since the Rule became effective and the proposed rule change does not impose an affirmative duty on members to obtain any additional information not already known to them. Therefore, implementation time is not necessary as members already file through FINRA Firm Gateway. For these reasons, the Commission designates the proposed rule change to be operative upon filing.<sup>13</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the

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<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>13</sup> For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2013-026 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2013-026. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule



change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-FINRA-2013-026 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).